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MAILED

MAR 23 2009

OFFICE OF PETITIONS

In re Application of :
Pallikaris, et al. : DECISION ON PETITION
Application No. 10/787,026 :
Filed: February 25, 2004 :
Atty. Dkt. No: 10781/26 :
:

This decision is in response to the petition to revive under 37 CFR 1.137(a), and the alternative petition under 37 CFR 1.137(b), filed March 12, 2009.

The petition to revive under 37 CFR 1.137(a) is hereby DISMISSED.

The petition under 37 CFR 1.137(b) is hereby HELD IN ABEYANCE.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)." This is not a final agency decision.

The application became abandoned June 18, 2008 for failure to timely submit a proper reply to the non-final Office action mailed March 17, 2008. The non-final Office action set a three month shortened statutory period of time for reply. Notice of Abandonment was mailed January 21, 2009.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(l); (3) a showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c).

The instant petition fails to satisfy requirement (3).

Petitioners have failed to present a showing to the satisfaction of the Director that the entire delay in filing the required

reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable.

The Office may revive an abandoned application if the delay in responding to the relevant outstanding Office requirement is shown to the satisfaction of the Commissioner to have been "unavoidable." See, 37 CFR 1.137(a)(3). Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term "unavoidable" "is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business"); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). A petition to revive an application as unavoidably abandoned cannot be granted where petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2d 1130 (N.D. Ind. 1987).

Petitioners assert non-receipt of the non-final Office action. Petitioners have provided information concerning the docketing procedures in place at correspondence address of record. Petitioners indicate that a search of the file jacket and the docket records indicate that the non-final Office action was not received. Petitioners have included a copy of the file jacket for the instant application. Petitioners have also included a copy of relevant portions of docket records for the instant application. Petitioners have also provided a copy of manual docket records for the instant application. Petitioners contend the supporting documentation establish non-receipt of the non-final Office action.

The showing required to establish non-receipt of an Office communication must include a statement from the practitioner describing the system used for recording an Office action received at the correspondence address of record with the USPTO. The statement should establish that the docketing system is sufficiently reliable. It is expected that the record would include, but not be limited to, the application number, attorney docket number, the mail date of the Office action and the due date for the response. Practitioner must state that the Office

action was not received at the correspondence address of record, and that a search of the practitioner's record(s), including any file jacket or the equivalent, and the application contents, indicates that the Office action was not received. A copy of the record(s) used by the practitioner where the non-received Office action would have been entered had it been received is required. A copy of the practitioner's record(s) required to show non-receipt of the Office action should include the master docket for the firm. That is, if a three month period for reply was set in the non-received Office action, a copy of the master docket report showing all replies docketed for a date three months from the mail date of the non-received Office action must be submitted as documentary proof of non-receipt of the Office action. If no such master docket exists, the practitioner should so state and provide other evidence such as, but not limited to, the following: the application file jacket; incoming mail log; calendar; reminder system; or the individual docket record for the application in question.

The instant petition does not establish non-receipt of the non-final Office action in compliance with the procedures set forth at MPEP 711.03(c). Specifically, petitioners have not provided a "master docket" or alleged that a "master docket" does not exist. Thus, the showing provided is insufficient to establish non-receipt of the non-final Office action.

Petitioners have alternatively requested consideration of the instant petition under 37 CFR 1.137(b). If petitioners elect to forgo further consideration of the instant petition under 37 CFR 1.137(a), any future request for reconsideration should be directed to reconsideration under 37 CFR 1.137(b).

Further correspondence with respect to this matter should be addressed as follows:

By mail:

Mail Stop Petition
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

By facsimile:

(571) 273-8300

By hand delivery:

U.S. Patent and Trademark Office
Customer Window, **Mail Stop Petition**
Randolph Building
401 Dulany Street
Alexandria, VA 22314

Telephone inquiries concerning this matter may be directed to the undersigned at (571) 272-3205.

/ALESIA M. BROWN/
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